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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE STATE OF NEW YORK,

Petitioner,

vs.

ANGEL L. MATEO,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

QUESTIONS PRESENTED

1. When a federal constitutional question presented in a state criminal case is decided in a technically separate pretrial proceeding and not reconsidered by the state appellate courts on appeal from the final criminal judgment, does this Court have jurisdiction to review the question on that appeal?

2. Does a state statute which forbids a guilty plea to capital murder, but makes an exception when the defendant, the prosecutor, and the court all agree on the plea and to a sentence less than death, violate the rule of *United States* v. *Jackson*, 390 U. S. 570 (1968)?

3. If so, should *Jackson* be overruled or declared inapplicable to post-*Furman* statutes?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION OF WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, the highest court of a state felt compelled to declare the state's death penalty law unconstitutional in part and overturn well-deserved sentences of multiple murderers, based on an ill-considered summary disposition by this Court 33 years

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

ago. Further, a dubious precedent of this Court casts a shadow over efforts to reform plea-bargaining. These results are contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS, STATUTES, AND CASE

On November 2, 1996, Angel Mateo kidnapped and murdered Juan Rodriguez-Matos, a mentally impaired young man whom Mateo thought might have information on the whereabouts of Mateo's estranged girlfriend. This murder was part of a month-long spree of crimes. Pet. for Cert. 3-4.

In New York's capital punishment law, the constitutionally required narrowing of the death-eligible class is built into the definition of first-degree murder. See N. Y. Penal Law § 125.27(1)(a)[2]; see also *Lowenfield* v. *Phelps*, 484 U. S. 231, 246 (1988) (holding that this is a constitutionally permitted method of narrowing). Murder in the course of a kidnapping is one of the circumstances that will raise an intentional murder to first degree, and hence make the defendant eligible for the death penalty. N. Y. Penal Law § 125.27(1)(a)(vii). If the prosecutor has given notice of intent to seek the death penalty, see N. Y. Crim. Proc. Law ("CPL") § 250.40, the jury determines the penalty by weighing the aggravating and mitigating factors. CPL § 400.27(11)(a). The aggravating factors are the eligibility factors from the guilt phase plus certain prior convictions. CPL § 400.27(3), (7).

The New York Constitution forbids jury waivers in capital cases. N.Y. Const., Art. I, § 2. By statute, murder defendants are forbidden to plead guilty to first-degree murder except with the consent of both the court and the prosecution and with a stipulated sentence less than death. CPL §§ 220.10(5)(e), 220.30(3)(b)(vii).

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2. The pertinent New York statutes are printed in the Appendix to this brief.

Mateo was indicted for first-degree murder. The trial court held that the plea statutes were unconstitutional under *United States* v. *Jackson*, 390 U. S. 570 (1968) because of the exception clause. The district attorney sought a writ of prohibition. See *Matter of Relin* v. *Connell*, 251 App. Div. 2d 1041, 674 N. Y. S. 2d 192 (1998).[3] The Appellate Division denied the writ but converted the proceeding into a declaratory judgment action and declared that the statute was constitutional. *Ibid.* The New York Court of Appeals consolidated its review of this decision with a similar case from another division and reversed. It held that the plea provisions were invalid but severable. "Under the resulting statute, a defendant may not plead guilty to first degree murder while a notice of intent to seek the death penalty is pending." *Matter of Hynes* v. *Tomei*, 92 N. Y. 2d 613, 629, 706 N. E. 2d 1201, 1208-1209 (1998).

The trial was not stayed during these proceedings. Mateo was convicted on December 3, 1998, and sentenced to death on December 16, 1998, six days before the Court of Appeals' decision. *People* v. *Mateo*, App. to Pet. for Cert. 9-10. Mateo appealed directly to the Court of Appeals. See *id.*, at 1. Given its prior decision in *Hynes*, the Court of Appeals determined that reversal of the death sentence was required by the hypothetical possibility that the defendant might have sought to avoid the death penalty by pleading guilty. *Id.*, at 10. The fact that both parties had unequivocally rejected the sentence bargain that was a statutory prerequisite to such a plea, see Pet. for Cert. 5-6, was not mentioned.

SUMMARY OF ARGUMENT

Respondent has raised a question regarding this Court's jurisdiction that is important and unresolved, and only this Court can resolve it. He claims that whenever this Court *has*

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3. Relin was the district attorney, and Connell was the trial judge. Mateo was an additional respondent.

jurisdiction to review an issue decided before a criminal trial in a nominally separate action, it necessarily *lacks* jurisdiction to review that issue on appeal from the final criminal judgment. That conclusion does not follow, but the unsettled state of the law on this point causes continuing problems for both the Court and counsel.

The state court in the present case rejected an argument that *United States* v. *Jackson* was distinguishable based on an unexplained summary disposition by this Court 33 years ago in *Atkinson* v. *North Carolina*. That summary disposition was ill-considered, because it did not meet this Court's criteria for summary disposition. Even so, it was binding on the state court. This is not a case where a state court has simply erred on a federal question. It is a case where that error was mandated by an old, improvident action of this Court which has never been corrected.

The continuing effect of *Jackson* is much broader than its prohibition of one particular, rare type of statute. The broad language of that opinion and the lack of resolution with the seemingly contrary results of later cases cast a shadow of uncertainty over attempts to control pleas and plea-bargaining in order to achieve more uniform and even-handed justice.

ARGUMENT

I. The jurisdictional objection raised by petitioner is, by itself, worthy of this Court's review.

Respondent Mateo claims that this Court lacks jurisdiction to review the question presented at this stage of the proceedings and that the question was only reviewable in this Court at an earlier stage. See Respondent's Brief in Opposition ("Opp.") 8-9. *Amicus* CJLF submits that the jurisdictional question raised by Respondent is an important one, unresolved to date, which can only be resolved by this Court. The jurisdictional question, by itself, is worthy of this Court's review.

Respondent contends that the decision of the New York Court of Appeals at the previous stage of this litigation was a final judgment for the purpose of defining this Court's jurisdiction to review the issue at that time, and therefore this Court does not have jurisdiction to review it now. See *ibid.* The premise of this argument is doubtful. Much more importantly, though, the conclusion does not follow.

In the previous stage of this case, the Appellate Division decided a federal constitutional question in a proceeding that was technically a separate, original action but was in substance a review of a ruling of the trial judge in the criminal case. That decision was then reviewed by the Court of Appeals. This mode of proceeding is neither novel nor unusual, and this Court has a long history of looking past the form and considering the substance when determining its own jurisdiction.

Nearly two centuries ago, a defendant in a pending federal prosecution for treason petitioned this Court for an original writ of habeas corpus. See *Ex parte Bollman*, 4 Cranch (8 U. S.) 75 (1807). Under the then-recent decision of *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137 (1803), this Court had no jurisdiction to issue an original writ to an executive officer. Despite the case being original in form, the *Bollman* Court decided it was appellate in reality, revising the decision of the committing court. 4 Cranch, at 100-101.

Similarly, *Matter of Hynes* v. *Tomei*, 92 N. Y. 2d 613, 705 N. E. 2d 1201 (1998) was a separate proceeding in form, but in reality it was an interlocutory appeal of rulings in the underlying criminal cases, one of which was Mateo's. Respondent cites *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549, 553-555 (1947) for the proposition that this "separate proceeding" form, and only the form, gave this Court jurisdiction to review the issue at that stage. See Opp. 8. *Rescue Army* does not go that far.

In *Rescue Army*, defendants facing trial in a criminal case petitioned the state appellate court for a writ of prohibition,

contending the trial court had no jurisdiction because the ordinance was unconstitutional. 331 U. S., at 550, 552. A ruling in the petitioners' favor, finding the statutes unconstitutional, would have ended the criminal action. See *id.*, at 567-568. Similarly, in the other case cited by Respondent, *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63 (1928), pretrial habeas corpus was used for the same purpose. See *Rescue Army*, *supra*, at 566-568. Both of these cases fall into the fourth category of *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 482-483 (1975), "where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of . . . the state proceedings still to come." This is because of the effect, not the form, of the judgment at issue. This is how the Court has understood *Rescue Army* in the years since it was decided. "A judgment that terminates original proceedings in a state appellate court, *in which the only issue decided concerns the jurisdiction of a lower state court*, is final, even if further proceedings are to be had in the lower court." *Fisher* v. *District Court of Sixteenth Judicial Dist. of Mont.*, 424 U. S. 382, 385, n. 7 (1976) (emphasis added). If *Rescue Army* stood for as broad a proposition as Respondent contends, the italicized clause in this passage would not be there.

The "final judgment" status of *Hynes* was a more difficult question than Respondent would have the Court believe. Indeed, as the Court has noted more than once, these questions are frequently difficult. See, *e.g.*, *Cox Broadcasting*, 420 U. S., at 478, n. 7. That is why the second step of Respondent's argument presents the much more important question. If this Court *does* have jurisdiction to review a judgment which is a separate proceeding in form but an interlocutory appeal in practice, does it follow that the Court does *not* have jurisdiction to review the same question on appeal from the final judgment in the underlying action?

Rescue Army strongly implies that the answer is no. At the time of that decision, cases challenging the constitutionality of statutes came under this Court's mandatory appeal jurisdiction and not the discretionary certiorari jurisdiction. See B. Boskey & E. Gressman, The Supreme Court Bids Farewell to Mandatory Appeals, 109 S. Ct. *109*, *123* (1988). Even so, the *Rescue Army* Court declined to decide the merits for prudential reasons. 331 U. S., at 584-585. "Our decision of course should be without prejudice to any rights which may arise upon final determination of the Municipal Court proceeding, *relative to review in this Court of that determination.*" *Id.*, at 584 (emphasis added). In other words, the *Rescue Army* Court held that it had the power to decide the constitutionality of the ordinances at the preliminary stage, but it declined to do so and stated that it could review them after final judgment in the underlying criminal action.

Respondent cites R. Stern, E. Gressman, S. Shapiro, and K. Geller, Supreme Court Practice 159, 161 (9th ed. 2002) ("Stern") to support the proposition that this Court did have jurisdiction to review *Hynes*. Opp. 9. Fair enough. But a few pages earlier in the same treatise, these authors state that the jurisdiction of this Court to review the same issue in the second round is an important but unresolved question:

> "The dilemma posed in such situations is one of the unintended consequences of ascribing finality to the first of two rulings by the highest state court. It is one thing to hold that a litigant may seek early review of a state court decision because otherwise the federal constitutional issue might disappear or be eroded. But it is quite a different matter to hold that a litigant is precluded from review if, having carefully preserved his constitutional claims on the remand, he waits for the end of the state court litigation before bringing his federal claims to the Supreme Court. Finality is too practical a doctrine to be turned into such a trap for litigants and such an erosion of the Court's jurisdiction to pass on substantial federal claims in state court

cases. Nothing in the Court's decision in *Cox*, or related cases, suggests that this result is mandated by the finality doctrine, as now interpreted.

"Nevertheless, the Supreme Court has not yet supplied a definitive answer to this question . . . . [P]ending some definite ruling on the matter, it is best to seek review of the first judgment whenever its finality is a reasonable possibility, and, if unsuccessful, to bring up the second judgment later." *Stern*, *supra*, at 156.

The last sentence of this passage is sound advice for the practitioner, but it generates unnecessary expense for the parties and creates an institutional problem for this Court. In this situation, two certiorari petitions are required where there should be only one.

A regime of mutually exclusive jurisdiction—first stage or second stage but not both—creates an additional problem for the Court. As noted earlier, the finality of a state court judgment at the first stage is often a close and difficult question. But the process of sorting through the thousands of certiorari petitions this Court receives each term, see *id.*, at 58, does not lend itself to deciding close and difficult questions at this stage. Where the substantive question is "certworthy" but the finality question is borderline, it would be better in most cases to deny certiorari on the first round and take up the issue when it comes back on an indisputably final judgment.

Respondent says that the New York courts could not revisit the issue in the second round because the decision in the first round was res judicata. Opp. 9. It is well settled that the refusal of state courts to reconsider an issue under the law-of-the-case doctrine does not preclude this Court's review. See, *e.g.*, *Hathorn* v. *Lovorn*, 457 U. S. 255, 261-262 (1982); *Reece* v. *Georgia*, 350 U. S. 85, 87 (1955). Does this Court's jurisdiction depend upon whether state practice gives a pretrial writ decision res judicata effect as opposed to law-of-the-case effect? That would require this Court to be familiar with the

practices of all 50 states in this regard, keep that information current, and apply it when deciding whether to grant certiorari in pretrial matters.[4]

Two simple rules would provide the clearest guidance for counsel and place the least burden on the Court. First, a decision which contemplates further proceedings in the state courts is a final judgment reviewable in this Court if and only if it fits within one of the four *Cox Broadcasting* categories, regardless of the form of the proceeding. Second, this Court always has jurisdiction to review federal questions on which the judgment rests, if properly presented to the state court, regardless of the stage of the litigation in which the question was decided.

The "properly presented" aspect of the second rule requires a brief mention here. In *Osborne* v. *Ohio*, 495 U. S. 103, 123-124 (1990), the defendant made his federal claims in a pretrial motion and received a definite ruling from the trial judge. The fact that he did not make a pointless and repetitive objection on the same ground when the jury was instructed did not bar this Court's review. "Were we to accept this position, we would force resort to an arid ritual of meaningless form, . . . and would further no perceivable state interest." *Id.*, at 124 (internal quotation marks omitted; ellipsis in original). So it is in this case. A party must, of course, fairly present his claim to the highest state court with jurisdiction to hear it, see *e.g.*, *Baldwin* v. *Reese*, 541 U. S. __ (No. 02-964, Mar. 2, 2004) (slip op., at 1), but repetitive submission to the same court is not required in habeas corpus, see *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 844 (1999), and it ought not be required on direct review. In the present case, it makes no difference whether the People renewed their *Hynes* argument to the Court of Appeals on

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4. Regrettably, counsel cannot always be depended on to fully brief jurisdictional issues. See, *e.g.*, *Florida* v. *Thomas*, 532 U. S. 774, 777 (2001); *Johnson* v. *California*, 541 U. S. __ (No. 03-6539, May 3, 2004) (slip op., at 4) (*per curiam*).

appeal from the final judgment. Just as in *Osborne*, they had made the argument, received the ruling, and preserved the issue for this Court's review.

The jurisdictional question in this case is, by itself, a "compelling reason[ ]" to grant a writ of certiorari, see Supreme Court Rule 10, postponing the jurisdictional question until the case is fully briefed and argued.

II. The state court's decision in this case was constrained by an ill-considered summary reversal issued 33 years ago, but which is still binding precedent.

When criminal defendants cite *United States* v. *Jackson*, 390 U. S. 570 (1968) most courts recognize that *Jackson* was limited by later decisions and decline to extend it beyond its facts. See, *e.g.*, *Parish* v. *Fulcomer*, 150 F. 3d 326, 328 (CA3 1998). In an earlier stage of the present case, however, the New York Court of Appeals extended *Jackson* well beyond its facts, based on the unexplained summary disposition by this Court in *Atkinson* v. *North Carolina*, 403 U. S. 948 (1971). See *Matter of Hynes* v. *Tomei*, 92 N. Y. 2d 613, 624, 706 N. E. 2d 1201, 1205 (1998). This remarkable extension of a precedent which has been universally understood to be limited demonstrates that the scope of *Jackson* requires further definition, and, in particular, that *Atkinson* must be reconsidered.

Jackson dealt with a seemingly straightforward federal kidnapping statute that provided for the death penalty when the victim was harmed "and if the jury shall so recommend . . . ." 390 U. S., at 571 (quoting 18 U. S. C. § 1201(a)). The defendant's contention was that the statute prohibited the death penalty in any case where there was no guilt-phase jury, thereby penalizing the defendant who elects to contest his guilt before a jury. See *id.*, at 571-572.

The Government suggested several ways this result could be avoided. One was that a jury could be convened for the

penalty phase only. The Court held that such a procedure was not legally authorized. See *id.*, at 576-577.[5] Another suggestion, particularly important to the present case, was that the Court exercise its supervisory power to forbid acceptance of guilty pleas and jury waivers in kidnapping cases subject to the death penalty. *Id.*, at 584. The Court did not dispute that, under this proposal, "no defendant tried under the federal statute would be induced to forego a constitutional right." *Ibid.* However, the Court said, such a requirement must come from the legislative branch and not the judiciary. See *id.*, at 585.

Reading *Jackson*, it is striking how far the Court bent over backwards to invalidate the death penalty portion of this statute. The notion that Congress really intended to empower kidnappers to unilaterally preclude the death penalty by pleading guilty is preposterous on its face. In other contexts, the Court has had no difficulty creating new procedures when necessary to meet constitutional requirements. See, *e.g.*, *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *Boykin* v. *Alabama*, 395 U. S. 238 (1969); *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). One cannot help but suspect that the *Jackson* Court's real problem with this statute was that it imposed the death penalty for a crime less than murder. Cf. *Coker* v. *Georgia*, 433 U. S. 584 (1977). Perhaps the Court's contrived procedural conundrum was a device for avoiding that result when it was not yet prepared to impose the substantive prohibition later adopted in *Coker*. Another possibility is that it was simply part of the run-up to *Furman* v. *Georgia*, 408 U. S. 238 (1972). See Hoffman, Kahn, & Fisher, Plea Bargaining in the Shadow of Death, 69 Fordham L. Rev. 2313, 2374-2375 (2001).

Whatever the motivation for the decision, *Jackson*'s "impermissible burden" rationale, see 390 U. S., at 572, was not carried to its logical limit. In *Bordenkircher* v. *Hayes*, 434 U. S. 357 (1978), the defendant faced a choice similar to that

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5. It is now. See 18 U. S. C. § 3593(b)(2)(A).

faced by Jackson. He could plead guilty to charges punishable by 2 to 10 years, or he could go to trial facing a possible life sentence. See *id.*, at 358-359; see also *id.*, at 372 (Powell, J., dissenting) (citing *Jackson*). Even so, the Court held that the prosecutor could legitimately "present[] the defendant with [these] unpleasant alternatives . . . ." *Id.*, at 365.

Unlike the statute in *Jackson*, the statute in the present case does not authorize the defendant to unilaterally remove the possibility of the death penalty by pleading guilty. Instead, the statute does what the *Jackson* Court declined to do judicially and said could only be done legislatively. That is, it forbids guilty pleas so long as capital punishment remains a possible sentence. See *Hynes*, 92 N. Y. 2d, at 622, 706 N. E. 2d, at 1204-1205, cf. *Jackson*, 390 U. S., at 585. The New York statute requires the consent of the prosecutor, the approval of the court, and a stipulated sentence less than death before a guilty plea to the highest degree of murder can be accepted. In other words, it requires a plea bargain.

These kinds of plea bargains are struck all the time. See, *e.g.*, *Edwards* v. *Carpenter*, 529 U. S. 446, 448 (2000). Their validity is no longer subject to serious constitutional question. The only thing the New York statute forbids is pleading guilty *without* such a bargain.

North Carolina had a similar statute until 1969. See *Parker* v. *North Carolina*, 397 U. S. 790, 792-793, n. 2 (1970). In *State* v. *Peele*, 274 N. C. 106, 111, 161 S. E. 2d 568, 572 (1968), decided two months after *Jackson*, the North Carolina Supreme Court considered *Jackson* and found the state statute to be distinguishable on precisely these grounds. In *State* v. *Atkinson*, 275 N. C. 288, 316, 167 S. E. 2d 241, 258 (1969), the same court rejected a *Jackson* claim, relying on its prior decision in *Peele*. The *Parker* Court evidently considered it an open question whether the statute violated *Jackson*. "It *may* be that under . . . *Jackson* . . . it was unconstitutional to impose the death penalty under the statutory framework which existed in

North Carolina at the time of Parker's plea." 397 U. S., at 794-795 (emphasis added).

Yet despite language in *Jackson* supporting the distinction and despite *Parker*'s implication that the question was open, this Court summarily reversed in *Atkinson*. The order gave no explanation except a citation to *Jackson* and another federal case in which *Jackson* error was conceded. *Atkinson* v. *North Carolina*, 403 U. S. 948 (1971). This summary action was entirely uncalled for. Summary reversal is appropriate only when it "does not decide any new or unanswered question of law, but simply corrects a lower court's demonstrably erroneous application of federal law." *Maryland* v. *Dyson*, 527 U. S. 465, 467, n.* (1999) (*per curiam*). In *Atkinson*, the North Carolina Supreme Court decided a question that *Jackson* had unambiguously left unanswered. Reversal of such a considered, reasonable decision warrants at least a *per curiam* opinion, if not full briefing and argument.

The New York Court of Appeals held it was bound by *Atkinson* and its companion cases. See *Hynes*, 92 N. Y. 2d, at 623-624, 706 N. E. 2d, at 1205-1206. When, and if, an issue decided summarily by this Court returns *here* for decision, it is well established that the previous summary disposition does not carry the same precedential weight as a full opinion. See *Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974). That is not true in any other court in the nation, however. "[T]he lower courts are bound by summary decisions by this Court until such time as the Court informs them that they are not." *Hicks* v. *Miranda*, 422 U. S. 332, 344-345 (1975) (brackets and inner quotation marks omitted); see also *Hunter* v. *Bryant*, 502 U. S. 224, 235 (1991) (*per curiam*) (Kennedy, J., dissenting).

It is one thing to say that an error by a state court that does not affect other states is not worthy of this Court's review. It is quite another to say that this Court should turn its back on a miscarriage of justice caused by its own improvident action of 33 years ago, summarily reversing a decision that was certainly debatable among reasonable minds, and quite possibly correct.

The issue presented by this case has never been decided by this Court in a written opinion, and it was not decided in the state courts in an unfettered opinion, free of the dubious restraint of *Atkinson*. The People of the State of New York have been permanently denied justice in this matter, on an issue which has never been properly considered.

III. *Jackson*'s uncertain scope continues to cause damage to this day, inhibiting reforms with a shadow of constitutional doubt.

Respondent maintains that reconsideration of *United States* v. *Jackson*, 390 U. S. 570 (1968) is not necessary because of "national conformity with *Jackson* . . . ." Opp. 9. This argument fails to appreciate the continuing damage caused by bogus constitutional restrictions. The people of the several States have the constitutional right to decide for themselves, through the democratic process, all of the issues that are neither decided directly by the Constitution nor assigned by the Constitution to the federal government. U. S. Const., Amdt. 10. When a precedent erroneously removes an issue from democratic control, that precedent violates this right every day it remains in effect. See *Elk Grove Unified School District* v. *Newdow*, 542 U. S. __ (No. 02-1624, June 14, 2004) (slip op., at 16) (Rehnquist, C. J., concurring in the judgment).

When a legislative body considers a possible improvement in criminal procedure, the possibility that a court might declare it unconstitutional places a heavy weight on the anti-reform side of the scale. The invalidation of a practice in widespread use is a disaster. Under *Griffith* v. *Kentucky*, 479 U. S. 314, 322-323 (1987) full retroactivity on direct appeal is a price that has to be paid for the integrity of judicial rule-making. Perhaps so, but it is an extremely heavy price nonetheless. States cannot afford to be the laboratories of innovation that our federal system envisions, see *Arizona* v. *Evans*, 514 U. S. 1, 8 (1995),

when the price of guessing wrong is the invalidation of judgments by the thousands.

One example of this inhibitory effect will illustrate the point. Plea bargaining is justified as a practical necessity, see *Blackledge* v. *Allison*, 431 U. S. 63, 71 (1977). However, the practice remains controversial, and there are good reasons to abolish it if abolition can be made practical. See 5 W. LaFave, J. Israel, & N. King, Criminal Procedure § 21.1(e)-(g), pp. 12-23 (2d ed. 1999). When widely varying punishments are meted out for the same conduct based on bargaining between individual prosecutors and defense attorneys, the potential for arbitrary, unequal dispensation of justice and mercy is obvious. One possible solution would be to substitute jury waivers for guilty pleas with a system giving concessions on the sentence for those defendants willing to waive jury trial.[6] See *id.*, at 22-23. "But for this to be a viable alternative, it must appear . . . that the Sixth Amendment right to jury trial is not absolute and thus may be lawfully discouraged by such tendering of concessions for its surrender." *Id.*, at 23. The uncertain scope of *Jackson* looms ominously over this proposal. A legislature would be foolish to try it when the possibility exists of a catastrophic invalidation of every criminal judgment in the state. See, *e.g.*, *People* v. *Collins*, 26 Cal. 4th 297, 306, 309, 27 P. 3d 726, 732-733 (2001) (holding, based in part on *Jackson*, that the trial court cannot offer an incentive for jury waiver, even though the prosecutor can).

Jackson is not, by its terms, limited to its specific facts. It is written in sweeping language. To date there has been no coherent explanation of why later cases that seem to come within its language were decided differently. See 5 LaFave, *supra*, at 34-35. Until that explanation is given, or until

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6. Ideally, arbitrariness would be minimized with a statute providing a uniform "discount" for all defendants who waive jury trial.

Jackson is simply overruled,[7] the constitutional status of attempts to bring greater uniformity to the granting of incentives for pleas or waivers will remain in doubt. While that status is in doubt, innovation is stifled.

CONCLUSION

The petition for writ of certiorari should be granted.

June, 2004

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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7. The result in *Jackson* need not be overruled. A statutory system that empowered any defendant, no matter how heinous his crime, to *unilaterally* preclude the death penalty by pleading guilty would be arbitrary in violation of *Furman* v. *Georgia*, 408 U. S. 238 (1972).

APPENDIX A

New York Penal Law

§ 125.27 Murder in the first degree.

A person is guilty of murder in the first degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; and

(a) Either:

(i) the intended victim was a police officer as defined in subdivision 34 of section 1.20 of the criminal procedure law who was at the time of the killing engaged in the course of performing his official duties, and the defendant knew or reasonably should have known that the intended victim was a police officer; or

(ii) the intended victim was a peace officer as defined in paragraph a of subdivision twenty-one, subdivision twenty-three, twenty-four or sixty-two (employees of the division for youth) of section 2.10 of the criminal procedure law who was at the time of the killing engaged in the course of performing his official duties, and the defendant knew or reasonably should have known that the intended victim was such a uniformed court officer, parole officer, probation officer, or employee of the division for youth; or

(iii) the intended victim was an employee of a state correctional institution or was an employee of a local correctional facility as defined in subdivision two of section forty of the correction law, who was at the time of the killing engaged in the course of performing his official duties, and the defendant knew or reasonably should have known that the intended victim was an employee of a state correctional institution or a local correctional facility; or

(iv) at the time of the commission of the killing, the defendant was confined in a state correctional institution or was otherwise in custody upon a sentence for the term of his natural life, or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the

minimum of which was at least fifteen years and the maximum of which was natural life, or at the time of the commission of the killing, the defendant had escaped from such confinement or custody while serving such a sentence and had not yet been returned to such confinement or custody; or

(v) the intended victim was a witness to a crime committed on a prior occasion and the death was caused for the purpose of preventing the intended victim`s testimony in any criminal action or proceeding whether or not such action or proceeding had been commenced, or the intended victim had previously testified in a criminal action or proceeding and the killing was committed for the purpose of exacting retribution for such prior testimony, or the intended victim was an immediate family member of a witness to a crime committed on a prior occasion and the killing was committed for the purpose of preventing or influencing the testimony of such witness, or the intended victim was an immediate family member of a witness who had previously testified in a criminal action or proceeding and the killing was committed for the purpose of exacting retribution upon such witness for such prior testimony. As used in this subparagraph "immediate family member" means a husband, wife, father, mother, daughter, son, brother, sister, stepparent, grandparent, stepchild or grandchild; or

(vi) the defendant committed the killing or procured commission of the killing pursuant to an agreement with a person other than the intended victim to commit the same for the receipt, or in expectation of the receipt, of anything of pecuniary value from a party to the agreement or from a person other than the intended victim acting at the direction of a party to such agreement; or

(vii) the victim was killed while the defendant was in the course of committing or attempting to commit and in furtherance of robbery, burglary in the first degree or second

degree, kidnapping in the first degree, arson in the first degree or second degree, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, aggravated sexual abuse in the first degree or escape in the first degree, or in the course of and furtherance of immediate flight after committing or attempting to commit any such crime or in the course of and furtherance of immediate flight after attempting to commit the crime of murder in the second degree; provided however, the victim is not a participant in one of the aforementioned crimes and, provided further that, unless the defendant`s criminal liability under this subparagraph is based upon the defendant having commanded another person to cause the death of the victim or intended victim pursuant to section 20.00 of this chapter, this subparagraph shall not apply where the defendant`s criminal liability is based upon the conduct of another pursuant to section 20.00 of this chapter; or

(viii) as part of the same criminal transaction, the defendant, with intent to cause serious physical injury to or the death of an additional person or persons, causes the death of an additional person or persons; provided, however, the victim is not a participant in the criminal transaction; or

(ix) prior to committing the killing, the defendant had been convicted of murder as defined in this section or section 125.25 of this article, or had been convicted in another jurisdiction of an offense which, if committed in this state, would constitute a violation of either of such sections; or

(x) the defendant acted in an especially cruel and wanton manner pursuant to a course of conduct intended to inflict and inflicting torture upon the victim prior to the victim`s death. As used in this subparagraph, "torture" means the intentional and depraved infliction of extreme physical pain; "depraved" means the defendant relished the infliction of extreme physical pain upon the victim evidenc-

ing debasement or perversion or that the defendant evidenced a sense of pleasure in the infliction of extreme physical pain; or

(xi) the defendant intentionally caused the death of two or more additional persons within the state in separate criminal transactions within a period of twenty-four months when committed in a similar fashion or pursuant to a common scheme or plan; or

(xii) the intended victim was a judge as defined in subdivision twenty-three of section 1.20 of the criminal procedure law and the defendant killed such victim because such victim was, at the time of the killing, a judge; or

(xiii) the victim was killed in furtherance of an act of terrorism, as defined in paragraph (b) of subdivision one of section 490.05 of this chapter; and

(b) The defendant was more than eighteen years old at the time of the commission of the crime.

2. In any prosecution under subdivision one, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant`s situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime except murder in the second degree; or

(b) The defendant`s conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime

except murder in the second degree. Murder in the first degree is a class A-I felony.

New York Criminal Procedure Law

§ 220.10 Plea; kinds of pleas.

The only kinds of pleas which may be entered to an indictment are those specified in this section:

1. The defendant may as a matter of right enter a plea of "not guilty" to the indictment.

2. Except as provided in subdivision five, the defendant may as a matter of right enter a plea of "guilty" to the entire indictment.

* * *

5. (e) A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law; provided, however, that a defendant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.

* * *

New York Criminal Procedure Law

§ 220.30 Plea; plea of guilty to part of indictment; plea covering other indictments.

* * *

3. (b) (vii) A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law; provided, however, that a defen-

dant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.

* * *

New York Criminal Procedure Law

§ 250.40 Notice of intent to seek death penalty.

1. A sentence of death may not be imposed upon a defendant convicted of murder in the first degree unless, pursuant to subdivision two of this section, the people file with the court and serve upon the defendant a notice of intent to seek the death penalty.

2. In any prosecution in which the people seek a sentence of death, the people shall, within one hundred twenty days of the defendant`s arraignment upon an indictment charging the defendant with murder in the first degree, serve upon the defendant and file with the court in which the indictment is pending a written notice of intention to seek the death penalty. For good cause shown the court may extend the period for service and filing of the notice.

3. Notwithstanding any other provisions of law, where the people file a notice of intent to seek the death penalty pursuant to this section the defendant shall be entitled to an additional sixty days for the purpose of filing new motions or supplementing pending motions.

4. A notice of intent to seek the death penalty may be withdrawn at any time by a written notice of withdrawal filed with the court and served upon the defendant. Once withdrawn the notice of intent to seek the death penalty may not be refiled.

New York Criminal Procedure Law

§ 400.27 Procedure for determining sentence upon conviction for the offense of murder in the first degree.

1. Upon the conviction of a defendant for the offense of murder in the first degree as defined by section 125.27 of the penal law, the court shall promptly conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or to life imprisonment without parole pursuant to subdivision five of section 70.00 of the penal law. Nothing in this section shall be deemed to preclude the people at any time from determining that the death penalty shall not be sought in a particular case, in which case the separate sentencing proceeding shall not be conducted and the court may sentence such defendant to life imprisonment without parole or to a sentence of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.

* * *

3. For the purposes of a proceeding under this section each subparagraph of paragraph (a) of subdivision one of section 125.27 of the penal law shall be deemed to define an aggravating factor. Except as provided in subdivision seven of this section, at a sentencing proceeding pursuant to this section the only aggravating factors that the jury may consider are those proven beyond a reasonable doubt at trial, and no other aggravating factors may be considered. Whether a sentencing proceeding is conducted before the jury that found the defendant guilty or before another jury, the aggravating factor or factors proved at trial shall be deemed established beyond a reasonable doubt at the separate sentencing proceeding and shall not be relitigated. Where the jury is to determine sentences for concurrent counts of murder in the first degree, the aggravating factor included in each count shall be deemed to be an aggravating factor for the purpose of the jury's consideration in determining the sentence to be imposed on each such count.

* * *

7. (a) The people may present evidence at the sentencing proceeding to prove that in the ten year period prior to the commission of the crime of murder in the first degree for which the defendant was convicted, the defendant has previously been convicted of two or more offenses committed on different occasions; provided, that each such offense shall be either (i) a class A felony offense other than one defined in article two hundred twenty of the penal law, a class B violent felony offense specified in paragraph (a) of subdivision one of section 70.02 of the penal law, or a felony offense under the penal law a necessary element of which involves either the use or attempted use or threatened use of a deadly weapon or the intentional infliction of or the attempted intentional infliction of serious physical injury or death, or (ii) an offense under the laws of another state or of the United States punishable by a term of imprisonment of more than one year a necessary element of which involves either the use or attempted use or threatened use of a deadly weapon or the intentional infliction of or the attempted intentional infliction of serious physical injury or death. For the purpose of this paragraph, the term "deadly weapon" shall have the meaning set forth in subdivision twelve of section 10.00 of the penal law. In calculating the ten year period under this paragraph, any period of time during which the defendant was incarcerated for any reason between the time of commission of any of the prior felony offenses and the time of commission of the crime of murder in the first degree shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration. The defendant`s conviction of two or more such offenses shall, if proven at the sentencing proceeding, constitute an aggravating factor.

(b) In order to be deemed established, an aggravating factor set forth in this subdivision must be proven by the people beyond a reasonable doubt and the jury must unanimously find such factor to have been so proven. The defendant may present

evidence relating to an aggravating factor defined in this subdivision and either party may offer evidence in rebuttal. Any evidence presented by either party relating to such factor shall be subject to the rules governing admission of evidence in the trial of a criminal action.

(c) Whenever the people intend to offer evidence of an aggravating factor set forth in this subdivision, the people must within a reasonable time prior to trial file with the court and serve upon the defendant a notice of intention to offer such evidence. Whenever the people intend to offer evidence of the aggravating factor set forth in paragraph (a) of this subdivision, the people shall file with the notice of intention to offer such evidence a statement setting forth the date and place of each of the alleged offenses in paragraph (a) of this subdivision. The provisions of section 400.15 of this chapter, except for subdivisions one and two thereof, shall be followed.

* * *

11. (a) The jury may not direct imposition of a sentence of death unless it unanimously finds beyond a reasonable doubt that the aggravating factor or factors substantially outweigh the mitigating factor or factors established, if any, and unanimously determines that the penalty of death should be imposed. Any member or members of the jury who find a mitigating factor to have been proven by the defendant by a preponderance of the evidence may consider such factor established regardless of the number of jurors who concur that the factor has been established.

* * *